

# Conyers and Nadler to Attorney General: Appoint Special Counsel to Investigate Torture

Tuesday, 28 April 2009

WASHINGTON, D.C. &ndash; Today, Congressman Jerrold Nadler (NY-08), Chair of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, Congressman John Conyers (MI-14), Chair of the House Judiciary Committee, and their Judiciary colleagues wrote to Attorney General Eric Holder requesting the appointment of a Special Counsel to investigate and, where appropriate, prosecute torture committed against detainees during the Bush administration. Similar letters were also sent to previous Attorneys General Gonzalez and Mukasey.

&ldquo;This letter makes official our views on the necessary procedure in investigating those U.S. officials who allowed or actively instructed others to commit torture,&rdquo; said Rep. Nadler. &ldquo;Because the United States is bound by its own laws and by international treaty, we are obligated to investigate and, where necessary, to prosecute those who have violated the laws against committing torture &ndash; whether by ordering it or committing it directly. We have no choice if we are to remain a just and principled nation of laws.

&ldquo;A Special Counsel is the most appropriate way to handle this matter. It would remove from the process any question that the investigation was subject to political pressure, and it would preempt any perceptions of conflict of interest within the Justice Department, which produced the torture memos. President Obama has honorably shown his commitment to the rule of law and placed this process into the hands of his able Attorney General, where it belongs. I look forward to working with Attorney General Holder on this, and with Chairman Conyers as the Judiciary Committee continues its oversight investigations.&rdquo;

The text of the letter follows.

April 28, 2009

The Honorable Eric Holder

Attorney General of the United States

U.S. Department of Justice

950 Pennsylvania Avenue, NW

Washington, DC 20530

Dear Mr. Attorney General:

We write to request that you appoint a special counsel for the investigation and possible prosecution of any violations of federal criminal laws related to the interrogation of detainees in the effective custody or control of the United States in connection with counter-terrorism operations or armed conflicts in the aftermath of the September 11, 2001 terrorist attacks on the United States. Many of us previously asked your predecessor, Attorney General Mukasey, to do so, expressing our desire to ensure an independent investigation into serious allegations that high-ranking officials, including lawyers and others from the Department of Justice itself, approved the use of enhanced interrogation techniques that amounted to torture.

Recent events highlight the need for such an appointment. The OLC memos formally released last week provide additional details regarding the purported legal justifications provided by DOJ lawyers for various interrogation techniques, including the slamming of detainees into walls, the use of stress positions, confinement in boxes, sleep deprivation, and waterboarding. The Senate Armed Services Inquiry into the Treatment of Detainees in U.S. Custody, declassified and released on April 21, confirms that these interrogation practices were developed at the request of and authorized by high-ranking administration officials, and that the abuse of detainees at Abu Ghraib and elsewhere can be linked to these policy decisions. Top Bush Administration officials previously testified that at least three detainees were subjected to waterboarding, and the recently released OLC memos reveal that one detainee was subjected to waterboarding 183 times in a one month period while another was subjected to waterboarding 83 times in one month.

During your confirmation hearings, you testified that waterboarding is torture, and the International Committee of the Red Cross, which had been denied access to detainees held at CIA secret prisons for several years, has concluded that the treatment alleged by fourteen of these detainees constituted torture. Earlier this year, the Bush Administration's top official in charge of military commissions concluded that the U.S. military's treatment of Mohammed al-Qahtani "met the legal definition of torture";

As you are aware, Justice Department regulations provide for the Attorney General to appoint an outside special counsel when: 1) a "criminal investigation of a person or matter is warranted"; (2) the "investigation or prosecution of that person or matter by a United States Attorney's Office or litigating Division of the Department of Justice would present a conflict of interest for the Department"; and 3) "it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter." Such counsel is to be appointed from outside the government and should have the authority to secure resources for the investigation and prosecution and have full investigatory and prosecutorial powers.

We believe that these three criteria have been met and warrant the appointment of a special counsel to investigate whether federal criminal laws were violated by individuals who authorized or participated in the interrogation of detainees. First, as noted above, there is abundant, credible evidence of torture and the cruel, inhuman, and degrading treatment of detainees, and criminal investigation is not only warranted, it is also required. The Geneva Conventions obligate High Contracting Parties like the United States to investigate and bring before our courts those individuals "alleged to have committed, or to have ordered to be committed" grave breaches of those Conventions. The war crimes act, 18 U.S.C. § 2441, creates jurisdiction in the U.S. courts whenever the victim or alleged offender is a U.S. national or member of the Armed Forces, and specifically identifies torture and cruel or inhuman treatment, as well as the conspiracy to commit those acts, as punishable war crimes. The Convention Against Torture (CAT) — signed by President Reagan in 1988 and ratified by the U.S. Senate in 1994 — also obligates the U.S. to conduct a "prompt and impartial investigation" and "submit the case to [our] competent authorities for the purpose of prosecution" whenever there are reasonable grounds to believe that torture has been committed in a territory under our jurisdiction or by U.S. nationals.<sup>9</sup> The federal anti-torture statute, 18 USC § 2340A, criminalizes torture and the conspiracy to commit torture and creates jurisdiction in the U.S. courts whenever the "alleged offender is a national of the United States" or "is present in the United States";

Second, a conflict of interest would be presented in having the Department investigate allegations that high-ranking Justice Department officials and lawyers provided legal guidance on and may have been involved in developing interrogation policy. For example, the Department of Justice's Office of Legal Counsel and former Attorney General and White House Counsel Alberto Gonzales advised the Administration and President to deny detainees the legal protection of the Geneva Conventions, and OLC lawyers wrote extensive legal memos that authorized specific interrogation techniques that likely amounted to torture. While some key individuals are no longer with the Department or Executive Branch, it is impossible to determine at this stage and before conclusion of the necessary investigation whether additional conflicts of interest might exist or arise. When Department lawyers are alleged to have been involved, we believe the Attorney General should turn to a special counsel.

Finally, there can be little doubt that the public interest will be served by appointment of a special counsel. The authorization and use of interrogation techniques that likely amounted to torture has generated tremendous concern and outrage in this country, and has harmed our legal and moral standing in the world. As a country committed to the rule of law, we must investigate and demand accountability for acts of torture committed by or on our behalf. Appointing a

special counsel to undertake this task would serve the interests of the Department and of the public in ensuring that the necessary investigation is thorough and impartial, and that the United States fairly investigates serious and credible accusations of misconduct, even where high-ranking government officials may be involved.

We applaud President Obama's efforts to assure America and the rest of the world that this Department's investigative and prosecutorial decisions will be free from political considerations. We are confident that you and the President will uphold this critical guarantee, and will restore the Department's independence and integrity. Yet, as you undoubtedly are aware, Americans on both sides of the political aisle worry that this issue already is mired in politics, with those who oppose investigation characterizing that possibility as a political witch hunt and those who, like us, support accountability expressing concern that the rule of law must be upheld. Given these factors, any decisions that you make regarding prosecutions will be perceived by some as political.

Appointment of a special counsel insulates you and the Department from such claims, and instills confidence that the outcome of the investigation could not possibly have been predetermined or otherwise improperly influenced.

The special counsel rules provide for both accountability and transparency. An appointed special counsel would be subject to Department ethics rules and to oversight by you to prevent undue expansion of the investigation. The special counsel would report to you about any decision to prosecute or not to prosecute; you could provide that report to Congress and the public, and would have to report to Congress if the special counsel is fired or the investigation halted. Appointing a special counsel balances the need, recognized after Watergate, to ensure independent investigation of high-ranking officials with the need to avoid prosecutors with unchecked power.

Given the importance of this issue, we look forward to a response to our request at your earliest convenience.